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No. 08-335

Supreme Court, U.S.
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In The
Supreme Court of the United States

MICHAEL B. DURAND,

Petitioner,

v.

CITY OF PHOENIX,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR REHEARING

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IN ITS BRIEF IN OPPOSITION, THE CITY OF PHOENIX ADMITS TO FRAUD UPON THIS COURT, THE COURT OF APPEALS AND THE DISTRICT COURT

No amount of artifice can conceal the City's fraud, misrepresentation and related misconduct – in this court and in the lower federal courts, which have considered this case. Civil Rule 60(b)(3) and (d)(3).

The City concealed, and still attempts to conceal, the existence of the Worksharing Agreement Between EEOC and the Arizona Civil Rights Division, dated 4 October 2007 [Petition Appendix 42-55] – disparaging the Agreement as "purported," and "unauthenticated." [*Opposition*, at 9]

Though the City is well aware of the significance of these EEOC worksharing agreements, even citing the pertinent case and footnote; its representatives forbear from quoting the case. [*Opposition,* at 8] However, Mr. Durand will reproduce the relevant passage in full:

> "1. A Title VII complainant generally has 180 days from the time of the alleged unlawful employment practice to file with the EEOC, 42 U.S.C. § 2000e-5(e)(1) (1994 ed.) but a 300-day filing period applies if the charging party 'institute[s] proceedings with a State or local agency with authority to grant or seek relief' from unlawful employment practices. Ibid; see also *EEOC v. Commercial Office Products Co.*, 386 U.S. 107 (1998). ***Virginia has such***

> ***an agency, operating under a work-sharing agreement with the EEOC.*** See *Tinsley v. First Union Nat. Bank*, 155 F.3d 435-444 (CA4 1998)." *Edelman v. Lynchburg College*, 535 U.S. 106, 109 n.1 (2002)." [Emphasis added]

Reading is not necessarily understanding. Does the City in its Brief in Opposition evince full *understanding* of the significance of the Worksharing Agreement Between EEOC and the Arizona Civil Rights Division, dated 4 October 2007 [Petition Appendix 42-55]; namely, that "a 300-day filing period applies"? *Edelman*, supra, n.1.

The answer is in the affirmative. In the City's very next paragraph of the Brief in Opposition, its representatives go on to say –

> "While the Petition refers to a purported 2008 worksharing agreement (Petition App. 42-55), such unauthenticated agreement was not presented in the District Court or to the Ninth Circuit Court of Appeals. Nor, more importantly, was there any evidence presented that in 2004 a similar worksharing agreement was in place." [*Opposition*, at 9]

Thus, the City in its Brief in Opposition doubts both the authenticity of the Worksharing Agreement and (oblivious to the contradiction) whether "in 2004 a similar worksharing agreement was in place." Ibid. However, the court will kindly note the City's conditional admission that *had* a similar worksharing

agreement been in place in 2004, *the 300-day filing period would have applied.*

Preceding the "purported" Worksharing Agreement [Petition App. 44-55] is a transmittal letter from EEOC to Mr. Durand, dated 27 May 2008 [Petition App. 42-43]. That transmittal letter indicates the Worksharing Agreement enclosed is EEOC's response to Mr. Durand's request *"for the latest copy* of the Worksharing Agreement between the Arizona Civil Rights Division and the EEOC." [Ibid., emphasis added]

By the time the City addressed this Court on 2 October 2008, in its Brief in Opposition, the City had been confronted with the Worksharing Agreement; the likely existence of a "similar" Worksharing Agreement in 2004; as well as what follows from such worksharing agreements: that "a 300-day filing period applies." [*Edelman,* supra, n.1; and *Opposition,* at 9]

May one infer, however, that the City came by this knowledge in time to mislead, not just this court but three federal courts, as to the EEOC filing requirement in Arizona? Well, the City does not argue – as it would have, had it been innocent – that either the 300-day filing requirement had changed over time; or that the City's own understanding of filing requirements had been altered by events.

A "smoking gun," however, exists in the public domain, and may be found on the City's own Official

Website, within the Phoenix Equal Opportunity Department's web pages:

> **"City Employment**
>
> Any City employee and/or job applicant who believe [sic] that he/she has been discriminated against in any aspect of employment or its process, may file a formal complaint of discrimination with the Equal Opportunity Department. Complaints of discrimination or harassment on the basis of race, color, religion, sex, age, disability or sexual orientation must be filed within 180 days of the alleged act(s) of discrimination. ***The 180-day time limit does not affect the complaint rights of those filing external complaints with federal/state agencies.*** An employee may also select to file an internal complaint within his/her own department. Job applicants may avail themselves of filing an internal complaint through the Personnel Department if they so choose." [App. 3, emphasis added]

The court's attention is respectfully directed to the emphasized language in the paragraph just quoted: "The 180-day time limit does not affect the complaint rights of those filing external complaints with federal/state agencies." Ibid.

Yet, knowing full well the 300-day filing requirement applied in Arizona; the City four times tells this court, as it told the lower federal courts, the 180-day requirement applied:

First instance:

"The Ninth Circuit Court of Appeals correctly stated and applied the statutory provisions relating to the timely filing of charges of Americans with Disability [sic] Act ("ADA" discrimination and retaliation claims with the EEOC." [*Opposition,* at 7]

Second instance:

"The Ninth Circuit Court of Appeals and the District Court before it, both correctly analyzed the law, and the evidence properly before them led them to conclude Petitioner failed to timely file his charge of discrimination." [*Opposition,* at 8]

Third instance:

"The law on timeliness of ADA charges of discrimination was properly applied to the facts presented in the District Court and reviewed on appeal by the Ninth Circuit Court of Appeals." [*Opposition,* at 9]

Fourth instance:

"The Ninth Circuit Court of Appeals properly analyzed the issue of the timeliness of the EEOC filing here. Based upon the evidence before the District Court, the appellate court properly determined that the EEOC filing was untimely, thereby barring the ADA claims." [*Opposition,* at 9-10]

What is to be done with a city, which misleads to their detriment three federal courts? Should not this

court relieve Mr. Durand from the judgments below – obtained as they were, by fraud, misrepresentation or misconduct? Civil Rule 60(b)(3) and (d)(3).

Also, the City of Phoenix is a "local agency" for federal civil rights purposes. [App. 1-9] Non-lawyers are expected to bring their own discrimination complaints:

> " . . . Congress presumably did not mean to affect the nature of Title VII as 'a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process.' *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 124 (1988); *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)." *Edelman v. Lynchburg College,* 535 U.S. 106, 115 (2002).

Even without the "Smoking Gun" [App. 3], quoted above, this court could – probably should – infer the City's actual or constructive knowledge of the Worksharing Agreement from the City's status as a "local agency," as well as its repeated references to both EECO and the Arizona Civil Rights Division [App. 2-9].

In light of all this, some thought should also be given to removing the City of Phoenix from its "oversight responsibility" "to ensure Americans With Disabilities Act (ADA) implementation" [App. 1] – as the first responsibility of law enforcement is to observe the law itself. "All the officers of the government, from the highest to the lowest, are creatures of

the law and are bound to obey it." *United States v. Lee,* 106 U.S. 196, 221 (1882).

DISTRICT COURT'S MISHANDLING OF PETITIONER'S ARIZONA CLAIM FOR EMOTIONAL DISTRESS (AND THE CITY'S MISINTERPRETATION OF THAT MISHANDLING)

Mr. Durand's Arizona claim for emotional distress took on added, even extreme, importance, in light of the District Court's doubts about the timeliness of Mr. Durand's ADA claims. Circumstances, which should have counseled caution, instead seem to have inspired the District to boldness in disposing of Mr. Durand's Arizona claim for emotional distress. As to the reason for the District Court's partial summary judgment on the state law claim, the Ninth Circuit concluded,

> "The district court also properly concluded that the acts Durand complained of were not sufficiently extreme and outrageous to state a claim for relief for intentional infliction of emotional distress." [Petition App. 2]

Thus, so far as the Ninth Circuit was concerned, Mr. Durand's emotional distress claim was dismissed on its merits, for failure to state a claim, and not for untimeliness or any other reason.

In this court, neither party has quarreled with the Ninth Circuit's conclusion, as to the reason for the

District Court's decision. In fact, the City even quotes the Ninth Circuit on this point. [*Opposition,* at 3] The District Court itself did not state its reasons for dismissing the emotional distress claim, though these can no doubt be gleaned from the Transcript of the Summary Judgment Hearing of 24 July 2006, which is part of the record on appeal.

Mr. Durand's emotional distress claim was contained in Count Four (the last Count) of his Complaint. [Petition App. 39] Count Four re-alleges and incorporates by reference the previous Counts, involving Mr. Durand's ADA and other federal claims – this time, though, under the Arizona rubric of emotional distress. Kindly see, for example, Paragraph 44 of the Complaint. [Petition App. 39]

In response to Mr. Durand's suggestion that his state law claim should have been remanded to state court, rather than dismissed as legally insufficient; the City argues –

> – that the only claimed instance of emotional distress, which was *not* time-barred, was the City's attempt to impose a "Last Chance Agreement"; and
>
> – that the "Last Chance Agreement" "was not actually presented to the District Court." [*Opposition*, at 12]

All the more reason for a remand, then, so that a state court could apply state law to the facts of a state case; including whether some of the claimed emotional distress might be time-barred. Perhaps Arizona

has a rule of "background evidence," similar to the one approved by this court in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002):

> "Nor does the statute bar an employee from using the prior acts ***as background evidence in support of a timely claim.***" [Emphasis added]

If Arizona does have such a rule, why could not such "background evidence" support the ***sufficiency*** of a timely claim for emotional distress, either in state or federal courts? There is no indication, anywhere in the transcript, the District Court considered, or was even aware of, this rule of "background evidence." In fact, all signs point the other way:

> "THE COURT: Tell me what – tell me – give me an example of an outrageous event attributable to the City of Phoenix *that occurred after January 30th, 2004*. [Transcript of the Summary Judgment Hearing of 24 July 2006, p. 16, emphasis added]

If the City's proposed Last Chance Agreement "was not actually presented to the District Court" in exhibit form [*Opposition*, at 12]; it was nevertheless "before the court," in the sense the District Court knew of it, discussed it, understood its purport and acted upon it:

> "THE COURT: Tell me what – tell me – give me an example of an outrageous event attributable to the City of Phoenix that occurred after January 30th, 2004.

> MR. GREGORY: Mr. Durand's attempt to return to work under the premise that he would first have to sign a Last – what was literally entitled a Last Chance Agreement, that he was coming back to work under –
>
> THE COURT: No, I understand that they – that after he got a reversal of the termination, it was changed to a period of suspension. When he tried to come back to work, the City of Phoenix said, Okay, but you've got to sign this thing that acknowledges this is your last chance. Anything else happens, you're out of here. . . . " [Transcript of the Summary Judgment Hearing of 24 July 2006, p. 16; see also, p. 19]

If Mr. Durand's federal claims were going to be dismissed, his Arizona claim for emotional distress – all of it – should certainly have been remanded to state court. *Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966); *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351-353 (1988).

CONCLUSION

For the foregoing reasons, this court should grant Mr. Durand's Petition for Rehearing and proceed to consider the cause on its merits.

Respectfully submitted,

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November, 2008

RULE 44 CERTIFICATION OF COUNSEL

This will certify that this Petition for Rehearing is restricted to the grounds set forth in Rule 44(2); namely, that the Petition is limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Further, I certify this Petition for Rehearing is presented in good faith and not for delay.

28 November 2008

BRUCE TYLER WICK
Counsel for Petitioner

Disability Access In The City Of Phoenix

http://phoenix.gov/CITZASST/disabilt.html

The Equal Opportunity Department has oversight responsibility within Phoenix city government to ensure Americans With Disabilities Act (ADA) implementation. If you have any questions, contact the Equal Opportunity Department at 602-262-7486, TTY 602-534-1557 or fax 602-495-0517.

» **You Have a Right to Acessible** [sic] **Programs, Services & Activities in *English* and *Espanol* Department**

» **ADA Liaison Directory**

» **ADA Compliance Efforts**

» **ADA Regulations and Disability Related Linkages**

» **City Department TTY Numbers**

Discrimination Complaints

http://phoenix.gov/EOD/complnts.html

Employment Discrimination Complaints

It is illegal to discriminate on the basis of race, color, sex, religion, national origin or marital status in any aspect of employment. The city investigates employment discrimination complaints against Phoenix employers of 14 or fewer employees. If you suspect you have been discriminated against in employment, call the Equal Opportunity Department's Compliance and Enforcement Division at 602-262-7486/voice or 602-534-1557/TTY. Federal and state governments investigate larger employers. Call the federal Equal Employment Opportunity Commission (602-640-5000/voice or 1-800-514-0393/TTY) or the Arizona Civil Rights Division of the Attorney General's Office (602-542-5263/voice or 602-542-5002/TTY). It also is illegal for the city or any city contractor or supplier with more than 35 employees to discriminate on the basis of sexual orientation. The city also will investigate these complaints.

Note: Persons with disabilities are protected against discrimination under the Americans with Disabilities Act and the Arizonans with Disabilities Act. This protection is afforded to all employees who work for employers with more than 15 employees. For more information contact the U.S. Equal Employment Opportunity Commission (602-640-5000/voice or 1-800-669-6820/TTY) or the Arizona Attorney General's Office (602-542-5263/voice or 602-542-5002/TTY). Persons with

disabilities who work for employers with less than 15 employees should contact a private attorney for assistance.

Small Employer Employment Discrimination Complaint Questionnaire Form

City Employment

Any City employee and/or job applicant who believe that he/she has been discriminated against in any aspect of employment or its process, may file a formal complaint of discrimination with the Equal Opportunity Department. Complaints of discrimination or harassment on the basis of race, color, religion, sex, age, disability or sexual orientation must be filed within 180 days of the alleged act(s) of discrimination. The 180 day time limit does not affect the complaint rights of those filing external complaints with federal/state agencies. An employee may also select to file an internal complaint within his/her own department. Job applicants may avail themselves of filing an internal complaint through the Personnel Department if they so choose.

City Employment Discrimination Complaint Questionnaire Form

Housing Discrimination Complaints

It is illegal to discriminate on the basis of race, color, sex, national origin or religion in the sale, lease, insuring or financing of housing. It also is illegal to

discriminate against families with children or individuals with disabilities. The Equal Opportunity Department investigates housing discrimination complaints within the city of Phoenix. If you suspect you have been discriminated against in housing, call the Compliance and Enforcement Division at 602-262-7486/voice or 602-534-1557/TTY.

Housing Discrimination Complaint Questionnaire Form

Public Accommodations Complaints

It is illegal to refuse or restrict service at any place of public accommodation on the basis of race, color, sex, religion, marital status or national origin. This includes Phoenix restaurants, hotels, theaters, parks, hospitals, nightclubs, health spas and all establishments offering services to the general public. The city will investigate complaints. Call the Equal Opportunity Department's Compliance and Enforcement Division at 602-262-7486/voice or 602-534-1557/TTY.

Note: Persons with disabilities are afforded protection against discrimination under the Americans with Disabilities Act and the Arizonans with Disabilities Act. The laws address access to facilities and services for persons with disabilities in places of public accommodation. For more information contact the U.S. Department of Justice (1-800-514-0301/voice or 1-800-504-0383/TTY) or the Arizona Attorney General's Office (602-542-5263/voice or 602-542-5002/TTY).

Americans With Disabilities Act (ADA) Complaints

Under the Americans With Disabilities Act, individuals with disabilities must have access to all city services, programs, activities and facilities. Any person believing that such access is not available at a city of Phoenix facility or program should contact the Equal Opportunity Department Compliance and Enforcement Division at 602-262-7486/voice or 602-534-1557/TTY. For property not associated with the city of Phoenix, call the Arizona Attorney General's Office (602-542-5263/voice or 602-542-5002/TTY) or Department of Justice ADA Information Line (1-800-514-0301/voice or 1-800-514-0383/TTY).

Smoking Complaints

In Phoenix, it is illegal to retaliate in the form of termination or discipline against persons who complain about smoking in the workplace. The law applies to all employers regardless of size within the Phoenix city limits. If you suspect you may have been retaliated against, call the Compliance and Enforcement Division at 602-262-7483/voice or 602-534-1557/TTY.

EMPLOYMENT DISCRIMINATION IS AGAINST THE LAW IN PHOENIX

http://phoenix.gov/EOD/discempl.html

What is fair employment?

All people have the right to compete for any job for which they qualify and to work in an environment that is free from discrimination. The city of Phoenix accepts external employment discrimination complaints on the basis of the following protected groups:

- Race
- Sex
- Color
- Religion
- National origin
- Marital status
- Sexual orientation (in certain cases – described below)

Note: Persons with disabilities are protected against discrimination under the Americans with Disabilities Act and the Arizonans with Disabilities Act. This protection is afforded to all employees who work for employers with more than 15 employees. For more information, contact the U.S. Equal Employment Opportunity Commission at 602-640-5000/voice or

1-800-669-6820/TTY, or the Arizona Attorney General's Office at 602-542-5263/voice or 602-542-5002/TTY.

City of Phoenix employees with disabilities also may file a complaint with the Equal Opportunity Department at 602-262-7486/voice or 602-534-1557/TTY.

Persons with disabilities who work for employers with less than 15 employees should contact a private attorney for assistance.

To whom does the law apply?

- The city of Phoenix accepts complaints against businesses within Phoenix city limits that have fewer than 15 employees.
- For businesses with 15 or more employees, the city refers the complaints to the U.S. Equal Employment Opportunity Commission and the Arizona Civil Rights Division.
- Companies with 35 or more employees that do business with the city of Phoenix as a contractor, subcontractor, vendor or supplier may not discriminate against anyone on the basis of sexual orientation

What are some examples of employment discrimination?

- Failure or refusal to interview or hire qualified women because they are pregnant.
- Dismissal of an Hispanic employee for missing work, yet other employees who are absent are not fired.

- Paying minorities less than non-minorities for the same work.
- Retaliation against employees who complain of discrimination or file a complaint of discrimination.
- Failure to provide a reasonable accommodation for an employee's religious belief. For example, a request for an unpaid day off on a religious holiday.

What should I do if I suspect an employer is discriminating against me?

- Keep a record of the incident. Document the date, time, location and comments made to you.
- Collect information and documentation such as witness names, pay stubs, etc. that will support your allegations.
- Contact the Equal Opportunity Department. Trained staff will review your complaint and determine if a violation has occurred.

When must I file a discrimination complaint?

- If you suspect you have been discriminated against in employment, you can file an online complaint by clicking here or by contacting the Equal Opportunity Department Compliance and Enforcement Division voice line at 602-262-7846 or the TTY relay at 602-534-1557 or fax 602-495-0571. A complaint must be filed within 180 days of the alleged incident. The department will report

its results to you within 150 days from the date you first filed the complaint.

What will the Equal Opportunity Department do with my complaint?

- The incident will be reviewed to determine that this office has proper jurisdiction over the matter.
- If this office has proper jurisdiction, an attempt will be made to resolve the complaint with all the parties to the incident.
- If a resolution is not possible, the assigned investigator will assess the case for the best course of action, which may involve an investigation.

Where can I get more information?

City of Phoenix
Equal Opportunity Department
Compliance & Enforcement Division
251 W. Washington St., 7th Floor
Phoenix, AZ 85003-2295

602-262-7486
602-534-1557/TTY
602-495-0517/Fax